Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 14-50
	)	
2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 09-182
	)	
Promoting Diversification of Ownership in the Broadcasting Services	)	MB Docket No. 07-294
	)	
Rules and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets	)	MB Docket No. 04-256

REPLY TO OPPOSITIONS TO PETITION FOR RECONSIDERATION

The National Association of Broadcasters (NAB)[1] hereby replies to the oppositions of the American Cable Association (ACA) and Office of Communication, Inc. of the United Church of Christ *et al*. (UCC)[2] to NAB's petition for reconsideration of the FCC's quadrennial review order.[3] The Oppositions offer no valid reasons for the FCC to decline to grant NAB's Petition.[4]

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[1] NAB is a nonprofit trade association that advocates on behalf of free local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies and the courts.

[2] ACA Opp. to Reconsideration, MB Docket Nos. 14-50 *et al*. (Jan. 24, 2017); UCC Opp. to Petitions for Reconsideration, MB Docket Nos. 14-50 *et al*. (Jan. 24, 2017) (the Oppositions).

[3] NAB Pet. for Reconsideration, MB Docket Nos. 14-50 *et al*. (Dec. 1, 2016) (Petition); *2014 Quadrennial Regulatory Review*, Second Report and Order, 31 FCC Rcd 9864 (2016) (Order).

[4] UCC *et al.* filed a motion to strike and dismiss NAB's Petition primarily on the grounds that NAB used undersized font for, and inserted arguments into, footnotes to "evade" the 25-page limit. Motion to Strike and Dismiss, MB Docket Nos. 14-50 *et al*. at 2 (Jan. 24, 2017).

I. THE OPPOSITIONS HEAVILY RELY ON THE SAME INVALID ARGUMENT

The Commission should disregard the Oppositions because they primarily rely on an invalid argument that misapprehends the standards for reconsideration petitions. UCC and ACA erroneously contend that NAB's Petition is deficient because it fails to identify a material error or omission warranting reconsideration. UCC Opp. at 4; ACA Opp. at 3, 15, 17, 22.

The Petition clearly explains, however, that the FCC erred by retaining or even tightening its local ownership rules while ignoring extensive empirical evidence and up-to-date information about the broadcast industry and the media marketplace; by relying on outdated data (some of which dated back to the 2002 ownership review); by making numerous conclusions without citing any real evidence or a sound economic rationale but

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NAB did not intend to evade any FCC rules. If the FCC is concerned about UCC's allegations, NAB will be happy to refile the Petition in its entirety, including all footnotes in larger font, in any one of the (at least) eight typefaces that comply with 47 C.F.R. § 1.49(a)'s typeface requirements and the 25-page limit, including Baskerville Old Face, Calibri, Chiller, Curlz MT, Garamond, Harlow, Times New Roman and/or Old English Text, rather than the Franklin Gothic Book typeface NAB originally used. NAB also will be happy to refile a shortened Executive Summary to our Petition, by removing the pages that summarized NAB's requests in greater detail.

The Commission should, however, simply exercise its discretion to act on the merits of NAB's petition as originally submitted. *See, e.g.*, *Complaint of Michael S. Levinson*, Memorandum Opinion and Order, 9 FCC Rcd 3018, 3018 n.1 (1994) (determining to consider merits of application for review well in excess of the 25 page limit). Notably, the FCC in this proceeding reviewed the merits of filings that violated several of the same rules UCC now highlights – including UCC's own Joint Reply Comments of United Church of Christ, OC Inc. and Common Cause, MB Docket No. 14-50 (Sept. 8, 2014). UCC and Common Cause violated § 1.49 by (1) single-spacing, (2) using in the main text a typeface size that, if we're generous, appears to be 9/72″ in height, well short of the required 12/72″, and (3) including footnotes in typeface size even smaller than 9/72″. Yet the FCC addressed their comments on the merits, citing them 16 times. Order at, *e.g.*, ¶¶ 309-312; *see also* Comments of ACA, MB Docket No. 14-50 (Aug. 6, 2014) (using incorrect footnote size throughout, yet cited in Order at ¶¶ 41, 45). ACA's 25-page Opposition to NAB's Petition would, according to UCC, also merit dismissal for using undersized footnotes, but NAB does not request such action. NAB also has no record of receiving the required service copy of the Opposition from ACA.

only its own unsupported assertions; and by citing evidence that, when reviewed, did not actually support the FCC's position. Given these errors, the FCC (1) failed to comply with its duty under § 202(h) of the 1996 Telecommunications Act to take a "fresh look" at the media marketplace and ensure that its ownership rules keep pace with competitive changes and remain in the public interest as the result of competition;[5] and (2) failed to meet the basic standards for rational decision-making under the Administrative Procedure Act (APA). *See* Petition at 2, 5-6, 9-10, 11-12, 14-16, 18, 21, 24. The Petition also explained that attributing TV JSAs violated the Communications Act of 1934 (Act) by tightening the local TV ownership rule without any finding (or any basis to find) that a more stringent rule would serve the public interest. NAB Petition at 11-12. NAB finds it difficult to imagine FCC errors more "material" than ones violating (1) the very Act that is the source of the FCC's substantive authority; (2) the specific statutory provision governing the FCC's quadrennial ownership reviews; and (3) the statute that governs agency rulemakings generally.

The Oppositions further claim that NAB's Petition is deficient because it presents evidence and arguments that ACA and UCC believe the FCC has considered and rejected. ACA Opp. at 3, 8-9, 12, 14; UCC Opp. at 4. While the FCC has the discretion to reject petitions relying on arguments that have been "*fully* considered and rejected" by the FCC within the same proceeding, this authority is permissive not mandatory. 47 C.F.R. § 1.429(l)(3) (emphasis added). And as discussed above and in the Petition, the FCC has either ignored, or not fully or seriously considered, available empirical evidence and relevant information, as well as arguments about the standards for FCC compliance with Section 202(h), the APA and the Act. To the extent, moreover, that ACA suggests that the FCC should not consider NAB's Petition because it does not raise new issues, then ACA misunderstands

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[5] *See, e.g., Prometheus Radio Project. v. FCC*, 373 F.3d 372, 391 (3d Cir. 2004).

the standard applicable to reconsideration petitions in rulemaking proceedings. Under Section 1.429(b), these types of reconsideration petitions must *not* rely on new "facts or arguments" (*i.e.*, those not previously presented to the FCC), *except* under very limited, specific conditions. ACA may be unclear on this point because it relies on inapposite FCC decisions, which involved another rule with different standards applicable to a different, specific type of reconsideration petition.[6] Complaints about the lack of new arguments accordingly present no sound basis for dismissing or denying NAB's Petition.

II. THE OPPOSITIONS MISAPPREHEND THE FCC'S OBLIGATIONS IN THESE PROCEEDINGS AND MAKE ERRONEOUS STATEMENTS ABOUT THE RECORD

Both Oppositions urge the FCC to ignore data and empirical evidence that they apparently cannot substantively refute on the spurious grounds that NAB submitted some of that evidence too late in the ownership proceedings. UCC Opp. at 5-6, 8; ACA Opp. at 18-19. NAB has already refuted these arguments, especially with regard to an empirical study showing that the eight-voices portion of the local TV rule is arbitrary, fails to advance the FCC's goal of promoting competition and proscribes pro-competitive transactions.[7]

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[6] ACA cites cases that concerned petitions under Section 1.106 requesting reconsideration of FCC denials of applications for review in non-rulemaking proceedings, which is not applicable here. Opp. at 9, n. 21. Section 1.106(b) *requires* this type of reconsideration petition to rely on new facts or changed circumstances or else be subject to dismissal, which is the exact opposite of the standard in Section 1.429(b). *See* 47 C.F.R. § 1.106(b)(2) & (3).

[7] Petition at 7, citing Kevin W. Caves and Hal J. Singer, Economists Incorporated, *An Economic Analysis of the FCC's Eight Voices Rule* (July 19, 2016) (Eight Voices Study), attached to NAB Written *Ex Parte*, MB Docket Nos. 14-50, 09-182 (July 19, 2016). NAB previously explained that the Eight Voices Study did not untimely present new substantive arguments but appropriately provided up-to-date empirical evidence to support arguments NAB made throughout the 2010 and 2014 reviews. NAB Written *Ex Parte*, MB Docket Nos. 14-50, 09-182, at 1-3 (July 28, 2016) (refuting claims from United Church of Christ and others that the Study was late filed); Petition at 7-8 & n. 19-20 (also explaining that the FCC's *ex parte* rules permitted submission of the Study and that the FCC has accepted and relied upon studies submitted shortly before an order is adopted in other proceedings).

The Oppositions' baseless complaints about the timeliness of a few of NAB's submissions also reveal a basic misunderstanding about the FCC's obligations under the APA and Section 202(h). Rather than simply "sit back and place the responsibility" on third parties for bringing information and empirical data about the media marketplace to its attention, the FCC has an "affirmative duty to assist the development of a meaningful record,"[8] a general "duty to evaluate its policies over time" especially if "factual and legal circumstances" change,[9] and a specific obligation to ensure that its ownership rules reflect current marketplace realities. *See, e.g.*, *Prometheus*, 373 F.3 at 391. UCC's complaint about NAB's "last-minute" *ex parte* filing concerning the cross-ownership rules misses this point entirely. UCC Opp. at 6, 8. Even if a written *ex parte* filing made on July 15, 2016 – nearly a month before the Order was adopted – could be deemed "last-minute" and "improperly submitted" (which it cannot), NAB's July 15 *ex parte* cited the Pew Research Center's 2016 *State of the News Media* report, which had been publicly available since *June* 15, 2016. The Order, moreover, cites earlier *State of the News Media* reports (*see, e.g.*, Order at ¶ 28, n. 63-65; ¶ 30, n. 67; ¶ 155, n. 425), so clearly the FCC is aware of these annual Pew reports and could easily have relied upon the most recent one. UCC's assertion (Opp. at 8) that the FCC could reasonably ignore the "newer information" from Pew's 2016 report cited in NAB's

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[8] *Democratic Central Comm. of D.C. v. Washington Metro. Area Transit Comm'n*, 485 F.2d 886, 905 (D.C. Cir. 1973) (observing that the "Commission's primary *raison d'etre* is furtherance of the public interest . . . and it could not fulfill that function if it did not assure, by its own efforts, that its decision would be based on a full record"); a*ccord Scenic Hudson Preserv. Conf. v. Fed. Power Comm'n*, 354 F.2d 608, 620 (2d Cir. 1965) (as the "representative of the public," an "agency owes the duty to investigate all the pertinent facts, and to see that they are adduced when the parties have not put them in"); *Office of Comm. of the United Church of Christ v. FCC,* 425 F.2d 543, 548 (D.C. Cir. 1969) (the FCC has "an affirmative duty to assist in the development of a meaningful record . . . .").

[9] *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992).

ex parte, and rely instead on a 2013 study cited in the Order (at ¶ 151, n. 420, also citing a 2011 source) does not comport with § 202(h), the APA and the FCC's "affirmative duty to inquire into and consider all relevant facts." *Scenic Hudson*, 354 F.2d at 620.[10]

Similarly, the FCC had an independent duty, regardless of whether NAB had submitted the July 2016 Eight Voices Study, to evaluate the eight-voices test anew, in light of changing marketplace conditions. Separate from its error in not considering the Eight Voices Study, the FCC's consistent failure to undertake even a basic economic analysis to determine the validity of its eight-voices standard renders the rule arbitrary and capricious and contrary to § 202(h). Petition at 5-6. The FCC is "not at liberty to sit back and place the responsibility for initiating or carrying through essential inquiries on private parties." *Dem. Cen. Comm*., 485 F.2d at 905.[11]

UCC also misunderstands the FCC's duty under § 202(h) in arguing that the FCC was justified in declining to consider reforming the local TV rule due to the incentive auction. Opp. at 3-4. Section 202(h) does not include a "wait and see" exception for spectrum auctions or any other events. Because Congress and the FCC decided several years ago that reducing the number of TV stations would serve the public interest, as NAB previously explained, the FCC cannot now use that public interest judgment as a basis to delay fulfilling its obligations under § 202(h) and modernizing its rules to reflect today's marketplace.[12]

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[10] UCC makes no attempt to defend FCC reliance on even older data, including from the 2002 biennial review order. *See, e.g*. Petition at 4, 8-10, 17.

[11] The FCC's response to NAB's Freedom of Information Act (FOIA) request seeking "[m]aterials including, but not limited to, studies, reports, articles, presentations, empirical data, surveys and/or internet sources" it relied on when drafting the Order further demonstrated that the FCC failed to conduct any serious examination of data and evidence to justify retaining the local ownership rules. *See* Letter of Rick Kaplan, NAB, MB Docket Nos. 14-50 *et al*. (Aug. 25, 2016) (attaching FCC response to NAB FOIA request).

[12] *See* NAB Written *Ex Parte*, MB Docket Nos. 14-50, 09-182 at 6-7 (June 21, 2016).

For its part, ACA makes inaccurate assertions and blatant misstatements about other studies submitted by NAB. For example, ACA dismisses as "anecdotal" NAB's evidence about the number of markets that do not exhibit station ratings and revenue patterns consistent with the top-4 restriction of the local TV rule. ACA Opp. at 14. In fact, NAB submitted studies in both 2012 and 2014 examining all 210 DMAs, and finding that the *majority* of markets with at least four commercial TV stations show the dominance of one or two stations and great disparities in station ratings and revenues within the top-four ranked stations.[13] Such evidence is hardly "anecdotal."

More seriously, ACA makes an egregious misstatement concerning NAB's study of the advertising marketplace, which concluded that a "properly defined" market would include non-broadcast outlets such as cable TV.[14] Although NAB's Petition clearly explained (at 4-5 & n. 14) that the FCC erred in discounting this study, ACA erroneously states (Opp. at 11) that the Petition "does not even attempt to explain its claims" that the FCC's reasons for rejecting the Advertising Study were illogical and unmeritorious. In fact, NAB explained in some detail why the FCC's rejection of the Study was both illogical on its face and unmeritorious.[15] The FCC should ignore ACA's careless and inaccurate arguments about the record evidence.

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[13] Petition at 9-10. NAB also noted that even assuming local station ratings today follow the same pattern as in 2002 – the last time the FCC reported on the number of markets with a "significant" breakpoint between the 4th and 5th ranked stations – the FCC's rationale for the top-4 restriction would be accurate and applicable to only 91 of 210 DMAs. *Id*. at 9.

[14] Petition at 4-5, discussing Kevin Caves and Hal Singer, Economists Incorporated, *Competition in Local Broadcast Television Advertising Markets* (Aug. 6, 2014) (Advertising Study), Att. A to NAB Comments, MB Docket Nos. 14-50 *et al*. (Aug. 6, 2014).

[15] As described in greater detail in the Petition (at 5 & n. 14), the FCC acted irrationally in rejecting the Advertising Study on the grounds that it looked only at advertising competition and not at other factors, especially audience share, because the FCC's *own* analysis of market definition in the Order discussed advertising competition at length, but did not evaluate audience share. NAB further explained why the FCC's statistical critiques of the Study were without merit (*e.g.*, the Order criticized cross-sectional regression analysis for

III. THE FCC SHOULD IGNORE ACA'S STALE RETRANSMISSION CONSENT COMPLAINTS

ACA also opposes NAB's requests for reconsideration of the local TV rule and the attribution of TV JSAs because broadcasters already allegedly possess "significant market power" over multichannel video programming distributors (MVPDs) in retransmission consent negotiations. ACA Opp. at 4-7, 15-16, 19. But ACA has shown no reason for turning this reconsideration of an ownership order into a vehicle to rehash its complaints about retransmission consent, especially given that the FCC, following a lengthy review, recently declined to alter the existing good faith negotiation rules.[16] NAB, moreover, has shown in numerous submissions and studies that ACA's claims (Opp. at 6) that MVPDs are "reeling" from broadcasters' exercise of market power under the existing ownership rules do not pass the laugh test.[17] Indeed, according to the Department of Justice, current marketplace

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supposed "missing variable bias" without specifying what the omitted variable might be and even though these regressions controlled for variables that prior academic work had found relevant; tried to explain away findings from the Study's fixed-effects regressions, which are more robust than statistical methods used in prior published work, by speculating without any basis that the data suffered from either "measurement issues" or a "lack of variation in the relevant variable," which they do not). *Id*. The FCC also erred in rejecting the Study's use of cross-sectional regressions because such cross-sectional regressions are a standard method routinely applied in econometric work. *See* Order at ¶ 29.

[16] *See* Chairman Tom Wheeler, *An Update on Our Review of the Good Faith Retransmission Consent Negotiation Rules*, FCC.gov (July 14, 2016).

[17] NAB has thoroughly refuted claims – including from pay TV operators with market capitalizations up to 200 times greater than some of the biggest local TV station groups – that MVPDs are at the mercy of broadcasters limited to owning a single TV station in most markets and need government regulatory assistance to negotiate retransmission consent agreements. *See, e.g.*, NAB Written *Ex Parte*, MB Docket Nos. 15-216, 10-71 (May 12, 2016); NAB Comments, MB Docket No. 15-216 (Dec. 1, 2015). Economic studies in fact have shown that the opposite is true. *See* Kevin W. Caves and Bruce M. Owen, *Bundling in Retransmission Consent Negotiations: A Reply to Riordan*, at 19-21, attached to NAB Written *Ex Parte*, MB Docket Nos. 15-216, 10-71 (Feb. 16, 2016) (incorporated into quadrennial review proceedings via NAB Written *Ex Parte*, MB Docket Nos. 14-50, 09-182 (June 6, 2016)) (the unconcentrated and fragmented nature of the upstream programming market, coupled with a highly concentrated MVPD market, potentially make a broadcaster's "failure to secure carriage with even a single MVPD" the "difference between profit and loss" and

dynamics give large MVPDs "significant bargaining leverage in their negotiations with programmers."[18] Pay TV providers' desire to maintain their negotiating power over local TV stations by keeping broadcasters in uneconomic ownership arrangements, as the MVPD industry grows ever more consolidated, provides no basis for refusing to grant NAB's Petition, reforming the local TV ownership rule and reversing the attribution of TV JSAs.

IV. THE FCC SHOULD IGNORE UCC'S KNEE JERK OPPOSITION TO ALL NAB PROPOSALS, INCLUDING THOSE TO PROMOTE NEW ENTRY

NAB expected UCC *et al.* to oppose its Petition and any proposal to reform any of the local ownership rules, however anachronistic in today's digital media marketplace. But UCC even opposes NAB's request for the FCC to reconsider its rejection of an incubator program designed to increase diversity by fostering new entrants into the broadcast industry – a goal that UCC purportedly supports. Remarkably, UCC opposes reconsideration of this issue even though both Chairman Pai and Commissioner Clyburn, and various civil rights organizations, support establishing an incubator program to promote new entry, with Commissioner Clyburn repeating her call for establishing a pilot program just last week.[19] UCC's opposition to a widely-supported proposal intended to foster new entry suggests that it primarily views the diversity issue as a means for opposing any change in the FCC's antiquated ownership rules, rather than a serious, real-world problem to be addressed with concrete solutions.

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therefore obtaining an MVPD distribution agreement is "a 'must have' input from the broadcaster's point of view").

[18] DOJ, Competitive Impact Statement at 5, *U.S.A. v. Charter Communications, Inc. et al.,* Civil Action No. 1:16-cv-00759 (RCL) (D.D.C. May 10, 2016).

[19] Prepared Remarks of FCC Comm. Mignon L. Clyburn, Capital Assets Conference: Financing Minority and Women Ownership in Broadcasting (Jan. 25, 2017); *see* FCC Public Notice*, Announcement of Draft Release of Comm. Clyburn's #Solutions2020 Call to Action Plan*, at 10 (Dec. 19, 2016); Dissenting Statement of Comm. Pai to Order, 31 FCC Rcd at 10057 (identifying civil rights groups supporting program).

Tellingly, UCC primarily objects to an incubator program as supposedly creating a "dangerous loophole" in the ownership rules. UCC Opp. at 11. But UCC (or the Order, for that matter) fails to explain how a targeted incubator program would be "dangerous" to the FCC's ownership regime, particularly a program initially applicable to radio only and limited to a sampling of markets of various sizes, as NAB previously suggested.[20] UCC presents no basis for the FCC to decline to reconsider its decision on an incubator program.

V. CONCLUSION

For the foregoing reasons and those stated in our Petition, the FCC should grant NAB"s request for reconsideration and reform its outdated local ownership rules.

Respectfully submitted,

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February 3, 2017

[20] NAB and MMTC Written *Ex Parte*, MB Docket Nos. 09-182, 07-294, attachment one at 1 (Jan. 30, 2013). UCC's Opposition (at 10) also makes much of the brevity of our reconsideration request and the fact that NAB's 2014 comments did not make a "specific proposal," but only urged the FCC to adopt an incubator program. In reality, NAB called for an incubator program in multiple submissions in these proceedings and discussed the implementation of such a program in some detail. *See, e.g.*, NAB and MMTC Jan. 30, 2013 *Ex Parte* with attachments (specifically outlining a pilot program).

CERTIFICATE OF SERVICE

I, Emmy Parsons, HEREBY CERTIFY that on this 3rd day of February, 2017, a true and correct copy of the foregoing Reply to Oppositions to Petition to Reconsideration in the above-captioned proceedings was submitted electronically to the Federal Communications Commission and served via First Class mail upon the following:

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